No. 11422

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Appellant,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

DANIEL B. TREFETHEN,
Attorney for Appellant.

1466 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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PRELIMINARY

Since this Court seems to have made its determination upon most of the points included in Appellant's appeal, and appellant feels that it will be ineffectual to attempt to change such decision of this court in such respects, yet appellant hereby takes the liberty of calling to the attention of the Court again one or two matters which do not appear to have been noted fully in the Court's opinion.

1. ALASKA PRICES REGULATED BY M.P.R. 194

This Court says (page 2 of its opinion): "While appellant contends to the contrary, Maximum Price Regulation No. 194 (7 F.R. 971, 3663) is clearly inapplicable to the transaction." It should be noted that Footnote (2) was a part of the original No. 194, as adopted prior to January, 1943.

But the clause in Footnote (2) was superseded by an amendment No. 10 of M.P.R. No. 194 (adopted in January, 1943) wherein it states, "The provisions of this Maximum Price Regulation No. 194 *supersede* the provisions of all other maximum price regulations, except where other maximum price regulations provide that notwithstanding Maximum Price Regulation No. 194, such other regulations shall be applicable in the Territory of Alaska." This Amendment was filed with the Federal Register (F.R. Doc. 34-780) and was in force during the whole of the period (April, 1943 - September, 1943) in which the sales were effectuated by Appellant (defendant) to his Alaskan buyers.

In this connection it should be noted that neither Order No. 3 under M.P.R. No. 193, nor the 2nd Rev. Max. Exp. Price Reg. which Appellee (plaintiff) contends is the Order and Regulation — when properly interpreted — establishing that Appellant (defendant) made an alleged $21,809.89 overcharge to his Alaska customers, contain any statement therein that "*such other regulation shall be applicable in the Territory of Alaska.*" Certainly no language can be clearer than the provision in M.P.R. No. 194, that

"the maximum price to a *buyer* in the Territory of Alaska shall be," and the further requirement in Amendment No. 10, of M.P.R. No. 194, that such M. P.R. No. 194 "*supersedes the provisions of all other maximum price regulations.*"

Furthermore, this Court has entirely lost sight of the fact that the Maximum Price Regulation statutes were intended to regulate prices at the place of the market — in this case Alaska — and that ALL buyers of this merchandise from Shyman had their places of business in Alaska.

It having been conceded by Appellee's counsel that there were no ceilings on Alaska merchandise, and this merchandise having been destined for the Alaska market at all times from the time of the beginning of the shipment in Minneapolis, Appellant still contends that the decisions of the United States Supreme Court are decisive on the question.

2. VALIDITY OF FORMULA NOT UNDER ATTACK; APPELLANT CONTENDS FOR NECESSITY OF WRITTEN ORDER FIXING SEATTLE PRICE

Appellant contends, further, that this court misconstrues Appellant's argument concerning the fixing of a Seattle price upon this merchandise. Appellant is not attacking the validity of the formula in the Regulation. Appellant still insists that it was the duty of some O.P.A. official to enter A WRITTEN ORDER establishing a Seattle price for the goods. That is the procedure adopted by this Court in *Martini v. Porter*, 157 F.(2d) 35, which procedure follows exactly the basic law as promulgated by Congress. This court

therein said (page 40): "Before the district court could lawfully enter a judgment based on or involving the amount of overcharges, *it was necessary for the OPA to enter this order.*" So, again, may we reiterate that a *written order establishing Seattle prices must have been* entered by some authorized OPA official, before judgment rightfully could be entered in this case.

This court, in its opinion, assumes that "adequate avenues of relief were open to Appellant by application to the Administrator for an authoritative written interpretation." The procedure referred to applies only when some O.P.A. official somewhere has established a price and the protestant insists that another price should be established as the correct ceiling price. But, in this case, no ceiling price in Seattle had ever been established by any official and Appellant's letters could find no means of making any such official establish such a price by written order as the law requires. The "uncertainties" as to such price were for the O.P.A. officials to determine and establish, and were not to be the action of Appellant under the law.

This court states that Appellant "concededly paid above ceiling prices to his suppliers." In such respect this Court is in error. Until a selling price had been established at Seattle by the O.P.A. by a written order, there was no "over-ceiling price violative of the law."

3. UNITED STATES AND WASHINGTON STATE STATUTES AND REGULATIONS CONCERNING LIQUOR CONTROL SET ASIDE WITHOUT COMMENT

This court has failed in its opinion to notice that both the United States Constitution as interpreted by the United States Supreme Court, and the statutes and liquor regulations of the State of Washington, provide that there can be no "domestic" sale of liquors in the State of Washington. Particularly, it should not be the law that by an *oral* interpretation of some O. P.A. official such liquor control of the state may be set aside by the O.P.A.

Furthermore, the Court has not exercised its chancellory powers herein, to right the wrong where an $18,020.25 loss due to admittedly—and not denied—wrong pricing methods of an O.P.A. official has caused an extreme hardship to this Appellant of whom the lower court stated that he had exercised the greatest good faith in trying to comply with O.P.A. statutes and regulations.

Because of lack of time to include additional authorities herein, Appellant respectfully prays this Court for an additional 15 days within which the decisions of other courts applicable to Appellant's contentions may be presented to this Court; in particular, such decisions as may appertain to an equitable method of adjusting the judgment in this case to the concededly good faith of all of Appellant's desires to conform to the complex rules and regulations of the O.P.A.

Respectfully submitted,

DANIEL B. TREFETHEN,
Attorney for Appellant.

VERIFICATION

STATE OF WASHINGTON, COUNTY OF KING—SS.

Daniel B. Trefethen, being first duly sworn, on oath, deposes and says as follows: That affiant is attorney for Appellant Alfred Shyman who is absent in Alaska; that affiant is personally familiar with all of the matters and statements set forth in the foregoing Petition for Rehearing; that he executes this verification as the act and deed of said Appellant Alfred Shyman for the uses and purposes therein stated, being authorized so to do; that he has read said Petition, knows the contents thereof and the same are true as he verily believes.

Daniel B. Trefethen

Subscribed and sworn to before me this 12th day of September, 1947.

Geo. P. Handley

Notary Public in and for the State of Washington, residing at Seattle.

CERTIFICATE OF COUNSEL

As counsel for Alfred Shyman, Appellant in the above Petition for Rehearing, I hereby certify that in my judgment the Petition is well founded and that it is not interposed for delay.

Daniel B. Trefethen

DANIEL B. TREFETHEN,
Attorney for Appellant.